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TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1929

No. 92

ROBERT H. LUCAS, AS COMMISSIONER OF INTERNAL REVENUE, PETITIONER

vs.

NORTH TEXAS LUMBER COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR CERTIORARI FILED MAY 14, 1930
CERTIORARI GRANTED OCTOBER 14, 1930

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A [Caption omitted.]

1 IN UNITED STATES CIRCUIT COURT OF APPEALS, FIFTH CIRCUIT

NORTH TEXAS LUMBER COMPANY, APPELLANT,

VERSUS

COMMISSIONER OF INTERNAL REVENUE, APPELLEE

Stipulation re certain exhibits

The præcipe filed with the United States Board of Tax Appeals in connection with the appeal of the North Texas Lumber Company requests that appellant's Exhibits 6 and 7 and appellee's Exhibit A and B be included in the record forwarded by the clerk of the Board of Tax Appeals. It is hereby stipulated and agreed between the attorneys for the parties to this cause that the said exhibits be treated as physical exhibits and made part of the record, but that said exhibits be not included in the printed record to be prepared.

J. J. ECKFORD,
FRANK J. ALBUS,
Attorney for Appellant.
C. M. CHAREST,
General Counsel, Bureau of Internal Revenue,
Attorney for Appellee.

2 BEFORE UNITED STATES BOARD OF TAX APPEALS

Docket No. 5208

NORTH TEXAS LUMBER COMPANY, PETITIONER

VS.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

For taxpayer: F. R. Angevine, Esq., Joseph J. Eckford, Esq.
For commissioner: L. C. Mitchell, Esq., S. S. Faulkner, Esq.

Docket entries

1925
June 29—Petition received and filed.
July 3—Copy of petition served on solicitor.
July 3—Notification of receipt mailed taxpayer.
July 22—Plea in bar filed by solicitor.
July 31—Copy served on taxpayer—assigned, Nov. 23, 1925.
Nov. 20—Motion to dismiss filed by solicitor.
Nov. 23—Hearing had before Mr. James—motion to dismiss denied.
Dec. 7—Order denying motion to dismiss and commissioners answer due in regular course, signed and filed. Both sides notified.
Dec. 23—Plea and answer filed by solicitor.

1926

Jan. 7—Copy of plea and answer served on taxpayer—assigned to field calendar.

3 Oct. 20—Hearing set Dec. 6, 1926. Fort Worth, Texas.

Dec. 6—Hearing had before Mr. Phillips on merits. Briefs due 60 days—10 additional days for reply.

1927

Jan. 18—Transcript of hearing filed Dec. 6, 1926.

Jan. 31—Brief filed by taxpayer.

Feb. 2—Motion for an extension to 3-7-27 to file brief, filed by G. C.

Feb. 3—Granted—both sides notified.

Feb. 28—Motion for extension to April 6, 1927, filed by G. C.

Mar. 1—Denied—both sides notified.

Sept. 1—Findings of facts and opinion rendered—(Mr. Phillips). Decision will be entered for commissioner.

Sept. 6—Order of redetermination, signed and filed. Both sides notified.

Oct. 24—Application to fix penal sum of bond to be filed by petitioner in the amount of $35,000, filed by taxpayer. Granted—both sides notified.

1928

Feb. 28—Petition for review by U. S. Cir. Ct. of Ap., 5th Cir. with assignments of error filed by taxpayer.

Feb. 28—Præcipe filed by taxpayer.

Feb. 28—Statement of evidence lodged by taxpayer.

Feb. 28—Proof of service of petition, statement, notice and præcipe filed.

Feb. 28—Notice of hearing 3-12-28 filed.

Feb. 28—Supersedes bond for $35,000.00 approved and ordered filed.

Mar. 9—Notice of appearance of Frank J. Albus as associate counsel for taxpayer filed.

4 Mar. 9—Stipulation for an extension of time to March 16, 1928, for filing objections to statement and to March 19, 1928, for settlement filed.

Mar. 19—Hearing had before Mr. Philips to settle record. Præcipe and statement of evidence filed at hearing.

Mar. 19—Statement of evidence approved and ordered filed.

[Certificate to foregoing paper omitted in printing.]

BEFORE UNITED STATES BOARD OF TAX APPEALS

Petition

The above-named taxpayer hereby appeals from the determination of the Commissioner of Internal Revenue contained in his office letters dated December 18, 1924 (IT : CA : 2551-9), Feb. 4, 1925 (IT : E : SM JHR-20645-8), and May 26, 1925 (IT : E : SM JHR-20645-8), and as the basis of its appeal sets forth the following:

5 1. The taxpayer was a corporation organized under the laws of Texas in November, 1909, with its principal office at Kildare, Texas. The corporation, however, is now dissolved.

2. That the U. S. Board of Tax Appeals has jurisdiction over this appeal in that the final determination of the tax liability was made subsequent to June 2, 1924, as evidenced by letters of the Commissioner of Internal Revenue dated Dec. 18, 1924, Feb. 4, 1925, May 26, 1295, copies of which letters are hereto attached.

(B. T. A. Decision No. 225, Boston Structural Steel Co., and B. T. A. Decision No. 277, The Buffalo Slag Co.)

3. The taxes in controversy are income and profits taxes for the calendar year 1927 and are in excess of $10,000.00 ($19,733.90).

4. The determination of tax contained in the various letters of the commissioner herein referred to, from which the taxpayer appeals, is based upon the following error:

That the commissioner has allocated to the year 1917 a profit of $79,057.95, resulting from the sale of timberlands, which profit the taxpayer very respectfully contends that as a matter of fact and as a matter of law was realized during the calendar year 1916 and accounted for in its income-tax return for such year and the tax paid thereon.

5. The facts which the taxpayer relies as the basis of its appeal are as follows:

The taxpayer, a corporation, was organized in November, 1909, under the laws of the State of Texas and was engaged in the business of operating a sawmill, buying and selling timberland, as well as the manufacturer and sale of rough and finished lumber. The corporation conducted the business continuously from its inception in 1909 down to the year of 1917, when liquidation was effected subsequent to disposal of the timberland. The authorized and fully paid capital amounted to $50,000.00. The books of the taxpayer were kept on an accrual basis.

6

On Dec. 27, 1916, Mr. L. D. Gilbert, secretary and general manager of the Southern Pine Lumber Co., a corporation, called at the Dallas, Texas, office of Mr. F. I. Clark, vice president of the North Texas Lumber Co., and made an offer to purchase certain lands of the North Texas Lumber Co., known as the Knox land. The price and payment being agreed upon, Mr. Gilbert then stated that he wanted to go to St. Louis, Mo., to arrange for the money, and inasmuch as his visit would require a few days, requested that a temporary memorandum of the terms of sale be drawn up; whereupon, there was prepared an instrument dated Dec. 27, 1916, executed for the North Texas Lumber Co. by its president, Mr. Wesley Morse, granting an option for a period of ten days to the purchaser, the Southern Pine Lumber Co., and specifically reciting that the said Southern Pine Lumber Co., "is to make known the exercise of this option by a written instrument delivered to the Clark & Boice Lumber Co. at its office in Dallas, Texas, within 10 days, or mail to it by registered letter within said 10 days from some point in the State of Texas."

On December, having completed arrangements for the money at the Boatman's Bank of St. Louis, Mr. L. D. Gilbert, secretary and general manager of the Southern Pine Lumber Co., sent a telegram from Texarkana, Texas, to Mr. F. I. Clark, vice pres. of the North Texas Lumber Co., informing him that financial arrangements had been made; that the Southern Pine Lumber Co. had exercised the option; and he instructed Mr. Clark to have the papers prepared, also asking that he be advised when the deed was ready so
7 that payment could be made. Acting upon this telegraphic communication, Mr. Clark, at Dallas, Texas, immediately telephoned to the president of the North Texas Lumber Co., Mr. Wesley Morse, of Linden, Texas, informing him that the deal was closed and that the Southern Pine Lumber Co. had exercised the option.

At the same time the option agreement of December 27th, 1916, was executed, being executed in the office of J. J. Eckford, attorney for the North Texas Lumber Company, F. I. Clark instructed its attorney to immediately begin to prepare the necessary papers, as there was no doubt that the Southern Pine Lumber Company could arrange for the money, and these papers were in process of preparation at the time the telegram was received by Mr. Clark and were completed and delivered on January 5th, 1927, at which time the cash consideration was paid.

The taxpayer contends that the manner in which this option was exercised by telegram was fully in accord with the conditions recited in the instrument, and, further than that, the purpose of the telegram was to expedite the closing of the trade, the preparation of all legal papers necessary, and to acquire actual possession of the lands.

In Treasury Department letter dated March 6, 1923, the commissioner notified the taxpayer that as the result of the audit of its 1917 return, which was originally rendered, showing a loss from operations of $13,745.08, that he had added a profit from the sale of land reported on supplemental 1916 return of $79,057.95, and therefore determined a net income subject to tax of $65,312.87. On the basis of this net income commissioner proposed to assess the sum of $34,739.23.

The taxpayer was advised of its privilege to appeal, provid-
8 ing that a waiver be executed and filed with the commissioner within 20 days from the date of his letter. A waiver was executed and sent by special delivery mail to the commissioner on March 17, 1923.

An appeal was filed with the commissioner on March 30, 1923, but while the appeal was pending 10-day notice and demand for tax was received from the local collector for the sum of $34,739.23. This assessment, it appears, was made while the appeal was pending, on the theory that the tax was in jeopardy, due to the tolling of the statute of limitation, notwithstanding the fact that the waiver had already been filed.

Claim for abatement was filed with the local collector by the stockholders of the defunct corporation and supported by a surety bond.

On May 3, 1924, the committee on appeal and review, after holding a hearing with representatives of the taxpayer, sustained the action of the Income Tax Unit and ruled that the profit was realized in 1917. Under date of May 13, 1924, the taxpayer requested the committee to reconsider the appeal, which request was granted. After further conference and hearing held in the office of the committee on June 16, 1924, the committee finally decided to sustain its decision of May 3, 1924. Accordingly, on Dec. 18, 1924, the taxpayer was advised by letter of this final determination.

An application was then made by the taxpayer for assessment under section 210 of the revenue act of 1917. The basis for this application was abnormal income resulting from the sale of capital assets and the inability of the taxpayer to determine its actual statutory invested capital.

This application was favorably considered by the special assessment section of the Income Tax Unit, and on Feb. 4, 1925, the commissioner addressed a letter to the taxpayer stating that the
9 excess-profits tax had been recomputed under section 210; that as a result thereof the total tax liability for the year 1917 was determined as $19,733.90, indicating an overassessment of $15,005.53.

On Feb. 26, 1925, the taxpayer requested that the special assessment section reconsider the matter further, with a view of reducing the tax liability.

After three months had elapsed the taxpayer was finally advised by the commissioner, in his letter dated May 26, 1925, that the tax liability determined in and shown in commissioner's letter of Feb. 4, 1925, was sustained and the case was deemed closed.

6. The taxpayer in support of its appeal relies upon the following proposition of law:

That the exercise of the option by telegram on Dec. 30, 1916, and the action taken thereon by the taxpayer definitely closed the transaction on that date and the profit on the sale is therefore properly taxable in the year 1916.

Wherefore, the taxpayer respectfully prays that this board may hear and determine its appeal.

JOSEPH J. ECKFORD,
Attorney for the Taxpayer.
Mercantile National Bank Bldg., Dallas, Texas.

[*Duly sworn to by F. I. Clark; jurat oath omitted in printing.*]

10 TREASURY DEPARTMENT,
Washington, Mar. 6, 1923.

[Copy]

Registered

IT:NR:F-1
LHR-3359

NORTH TEXAS LUMBER COMPANY,
Kildare, Texas.

In re: 1917 return

Sirs: An examination of your income tax return, together with the information heretofore submitted, has been made, and the results thereof are outli'ed in the attached statement.

You are advised that section 250 (d) of the revenue act of 1921 provides that assessment of additional tax found due as a re-
11 sult of an audit of a return must be made within five years from the date of which the return was filed, unless the Commissioner of Internal Revenue and the taxpayer consent in writing to a later determination, assessment, and collection of such tax. This section of the revenue act also provides that a taxpayer shall be granted a hearing and an opportunity to file with the Commissioner of Internal Revenue at Washington, D. C., an appeal showing any additional evidence which he desires to submit, except where the interest of the Government may be jeopardized by the delay.

Assessment of any additional tax found due on your return for 1917 must be made not later than April 18, 1923, the expiration of the five-year period provided in section 250 (d). If you desire that your case be given consideration before assessment is made, it will be necessary that the enclosed form of waiver be signed and returned to this office immediately; otherwise assessment will be made not later than twenty days from the date of this letter.

This assessment is in addition to all other outstanding and unpaid assessments appearing upon the collector's lists.

Payments should not be made until a bill is received from the collector of internal revenue for your district, and remittance should then be made to him.

Respectfully,

(Signed) E. M. CHATTERTON,
Deputy Commissioner.

12 Statement

IT:NR:F-1.
LHR-3359.

In re: North Texas Lumber Company, Kildare, Texas

1917

Loss reported original return	$13,745.08
Add:	
Profit from the sale of land reported on supplemental 1916 return	79,057.95
Net income corrected	$65,312.87
Invested capital reported	$50,000.00
Variable deduction	7%.
Excess-profits tax	$32,787.72
Income tax at 2%	650.50
Income tax at 4%	1,301.01
Total tax liability	$34,739.23
Tax previously assessed	None.
Tax due	$34,739.23

The contract of agreement attached to the supplemental return filed by you for the year 1916 shows that the agreement entered into December 27, 1916, was in the nature of an option only, and
13 that the consummation of the sale did not occur until January, 1917; therefore, the income reported on the supplemental return for 1916 has been transferred to the year 1917.

[Copy]

DALLAS, TEXAS, *March 17, 1923.*

Special delivery

COMMISSIONER OF INTERNAL REVENUE,
Washington, D. C.

In re: IT:NR:F-1.
LHR-3359.

DEAR SIR: Reference is made to your office letter dated March 6, 1923, addressed to the North Texas Lumber Company, Kildare, Texas, which letter finally reached the office of the writer this morning.

The North Texas Lumber Company operated at the above address in 1917 and years prior thereto, but in 1917 the assets were liquidated and the company discontinued business; this accounts for the fact that your letter did not reach me before the present date.

Inasmuch as it is our intention to protest the additional assessment arising from the increase of the taxable income for the year 1917 of this company, we have executed income and profits-tax waiver and are enclosing such waiver herewith. A formal protest embracing a full statement of facts relative to the income for the period in question will be forwarded to you for consideration within a few days.

Respectfully,

NORTH TEXAS LUMBER COMPANY.

Address P. O. Box 1598, Dallas, Texas.
Enc., waiver.

14 [Copy]

TREASURY DEPARTMENT,
Washington, Dec. 18, 1924.

IT:CA:2551-9.

NORTH TEXAS LUMBER COMPANY,
Kildare, Texas.

SIRS: Reference is made to your application dated May 13, 1924, for the reopening of the corporation's appeal covering the year 1917 and to reconsider the decision of the former committee on appeals and review.

The application originated from the action of this office in adjusting the income for 1917 for profit on sale of certain land the profit of which the corporation contends is properly applicable to the year 1916. The action of this office in adjusting the 1917 income to include the profit on sale of land was upheld by a decision of the former committee on appeals and review, and it is this decision that the corporation desires reconsidered.

The corporation's request for reconsideration is based upon the following contentions:

That a binding contract of sale was entered into as of December 30, 1916, and that profit from sale was derived during the year 1916 instead of the year 1917. In support of this contention the taxpayer files affidavits from the various parties involved stating that Mr. L. D. Gilbert, secretary and general manager of the Southern Pine Lumber Company, called at the Dallas office of Mr. F. I. Clark, vice president of the North Texas Lumber Company, on December 27, 1916, and entered into negotiations for the purchase of the
15 timber land in question, which resulted in the granting of the ten-day option which would give the purchaser time to make final arrangements with his bankers in St. Louis before closing the contract. The purchaser then departed from Dallas, and it is stated on December 30, 1916, he sent to Mr. Gilbert a telegram informing him that the financial arrangements had been made and that his company intended to carry through the trade. It is on the basis of the alleged exercise of the option on December 30, 1916, that the corporation claims the income was derived in 1916 rather than 1917.

The facts are: On December 27th the taxpayer corporation gave the Southern Pine Lumber Company for a period of ten days from date thereof an option to purchase certain "timberlands owned by the taxpayer corporation in the State of Texas." The Southern Pine Lumber Company was to make known the exercise of the option by a written instrument delivered to the Clark and Boice Lumber Company at its office in Dallas, Texas, within ten days, from some point in the State of Texas, the date of mailing to be indicated by postmark upon such letter. The deeds from taxpayers were executed and delivered to purchaser on January 5, 1917, and the money consideration therefor paid by purchaser on same day. The entries recording the sale were made in the books of the taxpayer in January, 1917, and the

taxpayer's original return for 1916 filed under date of June 23, 1917, included no profit from the sale of these lands. However, in April, 1918, a supplemental return was filed for the year 1916 reporting a profit from the sale of these lands in the amount of $79,059.95.

It is held by this office after carefully considering all the
16 facts presented in the light of law, court, and Treasury Decisions in cases of like and similar nature, even conceding that the telegram of December 30, 1916, was received by the taxpayer corporation, that the taxpayer corporation had merely a contract of sale as of that date and that the profit was not realized by it until January, 1917. The previous adjustment of this office resulting in additional tax of $34,739.23 for 1917 is therefore upheld.

Respectfully,

J. G. BRIGHT,
Deputy Commissioner.
By F. R. CLUTE,
Head of Division.

TREASURY DEPARTMENT,
Washington, Feb. 4, 1925.

IT:E:SM.
JHR—2064–8.

NORTH TEXAS LUMBER COMPANY,
704 Praetorian Bldg., Dallas, Texas.

SIRS: Reference is made to your corporation income and excess-profits tax returns for the calendar year 1917.

You are advised that after careful consideration and review your application for assessment of your excess-profits tax under the provisions of section 210 of the revenue act of 1917 has been allowed. Your excess-profits tax is based upon a comparison with a group of representative concerns which, in the aggregate, may be said to be engaged in a like or similar trade or business to that of your company.

The result of the audit under the above-mentioned provisions is as follows:

17 Net income as disclosed in bureau letter dated March 3, 1923		$65,312.87
Computation of tax		
Excess-profits tax (section 210)		$16,824.60
Net income	$65,312.87	
Less: Excess-profits tax	16,824.60	
Income subject to tax at 2% and 4%	$48,488.27	
Income tax at 2%		969.77
Income tax at 4%		1,939.53
Total		$19,733.90
Tax previously assessed (March, 1923, page 3, Linel, Spl. 7)		34,739.23
Overassessment		$15,005.33

In accordance with the above conclusions your claim for abatement of $34,739.23 will be rejected for $19,733.90.

The collector of internal revenue for your district will be officially notified of the rejection at the expiration of thirty days from the date of this letter.

Upon receipt of notice and demand from that official, payment should be made to his office, in accordance with the conditions of his notice.

The overassessment shown about will be made the subject
18 of a certificate of overassessment which will reach you in due course through the office of the collector of internal revenue for your district and will be applied by that official in accordance with section 281 (a) of the revenue act of 1924.

Respectfully,

J. G. BRIGHT,
Deputy Commissioner.

(Signed) By S. T. ENES,
Chief of Section B.

TREASURY DEPARTMENT,
Washington, May 26, 1925.

IT:E:SM.
JHR—20645–8.

NORTH TEXAS LUMBER COMPANY,
704 Praetorian Building, Dallas, Texas.

SIRS: Reference is made to your protest dated February 26, 1925, against the allowance of your application for assessment of your profits tax under the provisions of section 210 of the revenue act of 1917, as set forth in bureau letter dated February 4, 1925.

After a careful review of your protest and of all the evidence submitted in support of your contentions, the bureau holds that the degree of relief allowed was determined in accordance with the provisions of section 210 of the revenue act of 1917, and that all the abnormalities affecting the case have been taken into account as nearly as may be.

19 Accordingly the conclusions set forth in the above-mentioned letter are sustained.

Your case is, therefore, deemed closed.

Respectfully,

J. B. BRIGHT,
Deputy Commissioner.
By S. T. ENES,
Chief of Section.

[Certificate to foregoing paper omitted in printing.]

Before United States Board of Tax Appeals

Plea and answer

The Commissioner of Internal Revenue, by his attorney, A. W. Gregg, Solicitor of Internal Revenue, by way of special plea to the petition of the above-named taxpayer, avers:

(1) That the taxes which are made the subject matter of this appeal was assessed by the commissioner prior to the passage of the revenue act of 1924.

20 (2) That the commissioner has not since the passage of the revenue act of 1924 proposed to assess additional taxes against the taxpayer for the year 1917.

(3) That the commissioner's letter of May 26, 1925, from which the present appeal is taken confirmed the commissioner's letter of February 4, 1925, which showed a determination of overassessment had been made for the year 1917, the only year in controversy.

(4) That the commissioner, on February 4, 1925, advised the taxpayer in a letter sent by registered mail of his final determination of the overassessment due to the taxpayer.

(5) That the taxpayer's appeal was not filed until June 29, 1925, or more than sixty days thereafter.

(6) By reason of these facts this board is without jurisdiction to hear and determine the appeal.

The Commissioner of Internal Revenue, by his attorney, A. W. Gregg, Solicitor of Internal Revenue, without waiving the foregoing appeal but relying thereon for answer to the petition admits and denies as follows:

(1) Admits the allegations contained in paragraphs 1 and 3 of the taxpayer's petition.

(2) Denies the allegations contained in paragraph 2.

(3) Admits that the commissioner has determined that the taxpayer realized a profit of $79,057.95 in the year 1917 from the sale of timberlands. Denied that said profit was realized in 1916.

21 (4) Admits the portion of paragraph 5 of the petition contained on page 2 thereof.

(5) Admits that the deeds affecting the transfer of the timber lands in controversy were executed and delivered on January 5, 1917, and that the consideration was then paid.

(5) Avers a lack of knowledge or information sufficient to from [form] a belief as to the allegations of the part of paragraph 5 contained on pages 3 and 4 of the petition, and in the first line on page 5 of the petition, and denies the same.

(7) Admits the remaining portion of paragraph 5 of the petition.

(8) Denies generally and specifically each and every allegation contained in the taxpayer's petition not hereinbefore admitted, qualified, or denied.

Under the circumstances of this case the sale of timber lands took place on January 5, 1917.

Wherefore it is prayed that the taxpayer's appeal be denied.

———— ————,
Solicitor of Internal Revenue, Attorney for the Commisisoner of Internal Revenue.

Of counsel:
L. C. MITCHELL,
Special Attorney, Bureau of Internal Revenue.

22 [Certificate to foregoing paper omitted in printing.]

Before United States Board of Tax Appeals

NORTH TEXAS LUMBER COMPANY, PETITIONER
v.
COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Docket No. 5208

Promulgated September 1, 1927.
A true copy:
Teste:

B. D. GAMBLE,
Clerk, U. S. Board of Tax Appeals.

Findings of fact and opinion

1. The petitioner in 1916 granted an option to purchase its property and in that year received notice that the option would be exercised and that the purchaser approved the title. In 1916 there was no delivery or tender of a deed and no delivery of possession of the property. Before the close of 1916 the purchaser was ready, able, and willing to perform the contract but had made no tender of the purchase price. In 1917 payment was made and deed delivered. The petitioner kept its accounts and made its returns upon an accrual basis. Hold [held] that title passed in 1917, that the purchase price first accrued in 1917, and that any gain is to be refunded as income in 1917.

23 2. A contract to sell property does not pass title to the property or in the absence of tender or delivery of the property or of title thereto give the vendor a right to maintain an action for the purchase price.

Joseph J. Eckford, Esq., for the petitioner.
S. S. Faulkner, Esq., for the respondent.

The petitioner seeks a redetermination of a deficiency of $19,733.90 in income and profits taxes for 1917, arising from the denial by the

commissioner of a claim for the abatement of an assessment of additional tax. The only question involved is whether the profit from the sale of certain timber lands was income to the petitioner in the year 1916 or in the year 1917.

Findings of fact

The taxpayer, a coropration, was organized in November, 1909, under the laws of the State of Texas and was engaged in the business of operating a sawmill, buying and selling timberland, as well as the manufacture and sale of rough and finished lumber. The corporation conducted the business from its inception in 1909 down to the year 1917, when liquidation was effected subsequent to disposal of the timberland. The authorized and fully paid capital amounted to $50,000. The books of the taxpayer were kept on an accrual basis.

During the summer or fall of 1916 officers of appellant negotiated with the officers of the Southern Pine Lumber Company for the sale of timber lands, known as the Knox lands, title to which was in appellant and also in the Clark and Boice Lumber Company and a minor, Kelly Morse. On December 27, 1916, the price was agreed upon and an option contract executed at Dallas, Texas, reading as follows:

24 STATE OF TEXAS,

County of Dallas.

The following contract and agreement is this day entered into by and between Clark & Boice Lumber Company, North Texas Lumber Company, and Wesley Morse, parties of the first part, and the Southern Pine Lumber Company, party of the second part:

In consideration of the sum of one hundred ($100.00) dollars to parties of the first part paid by party of the second part parties of the first part hereby grant, contract and convey to party of the second part an option for the period of ten (10) days from the date hereof to purchase of one or more of the parties of the first part the hereinafter-described property upon the terms and for the consideration hereinafter named.

The property to be purchased from the Clark & Boice Lumber Company consists of the property out of the Jose Maria Mora grant in Anderson County, conveyed to Clark & Boice Lumber Company by Fannie M. Shelton and husband and Orra G. More by deed dated July 25, 1916, and duly recorded in vol. 113, page 612, deed records of Anderson County, Texas, to which deed and the record thereof reference is here made for a more particular description of said property, consisting of about one thousand and fifty-four (1,054) acres of land.

From the North Texas Lumber Company—all of the property situated in Anderson and Cherokee Counties, Texas, described in a certain deed from Hiram Knox and Mary S. Knox, to North Texas

Lumber Company, dated May 18, 1915, and duly recorded in the deed records of Cherokee and Anderson Counties, Texas, to which deed and record thereof reference is here made for a more particular description of said property, consisting of about 14,000 acres of land.

Also from the North Texas Lumber Company—the timber rights vested in it, the said North Texas Lumber Company, by a certain contract between C. Lombardi and Caroline Ennis Lombardi and the North Texas Lumber Company, dated March 8, 1915, upon about 1,213 acres of land in the Highsmith survey and T. P. Hotchkiss survey in Anderson County, reference being here made to said contract for a more particular description of said land. Also the timber rights vested in James Kelly Morse by a conveyance from the State of Texas upon one hundred (100) acres of land situated in Cherokee County, Texas, the said conveyance from the State of Texas being dated in the year 1916, and the only contract of that nature existing between the State of Texas and the said James Kelly Morse.

The consideration for said conveyance is the sum of two hundred thirteen thousand five hundred ($213,500.00) dollars, cash, and the agreement and assumption by the said Southern Pine Lumber Company of the unpaid purchase money, principal, and interest, against any of the properties above named and the obligation of the grantee, as evidenced by the various instruments herein referred to, and all unpaid taxes against said land. Land, timber rights, and other rights is to be conveyed by parties of the first part to party of the second part by special warranty deed, but any rights that any of said parties of the first part may have by reason of warranties and the like, are to be conveyed and vested in said Southern Pine Lumber Company.

In case said Southern Pine Lumber Company exercises the option herein granted within the time herein named then the one hundred ($100.00) dollars paid at the time of the execution of this instrument, receipt of which is hereby acknowledged, is to be credited upon and to be a part of the cash consideration above named of two hundred and thirteen thousand five hundred ($213,500.00) dollars. The Southern Pine Lumber Company is to make known the exercise of this option by a written instrument delivered to the Clark & Boice Lumber Company at its office in Dallas, Texas, within ten (10) days or mailed to it by registered letter within said ten (10) days from some point in the State of Texas, the date of mailing to be indicated by the postmark upon such letter. A satisfactory indemnity obligation is to be executed by Wesley Morse to the Southern Pine Lumber Company to protect it in accepting a deed from James Kelly Morse to his rights to the one hundred (100) acres hereinabove mentioned.

Witness our hands, respectively, this 27th day of December, A. D. 1916.

NORTH TEXAS LUMBER CO.,
(Signed) By WESLEY MORSE, *Pres.*
CLARK & BOICE LUMBER CO.,
(Signed) By F. L. CLARK, *Mgr.*
(Signed) WESLEY MORSE,
Parties of the First Part.
SOUTHERN PINE LUMBER CO.,
(Signed) By L. D. GILBERT, *Secy. & G. M.*,
Party of the Second Part.

Gilbert, the secretary and general manager of the Southern Pine Lumber, who negotiated and executed the option on behalf of that company, received on December 27, 1916, from the attorney of the North Texas Lumber Company an abstract of title and written opinion of the attorney, and stated that he was satisfied with the title and his company would assume one suit in respect to the title
27 which was pending. The Southern Pine Lumber Company required a few days in which to arrange to borrow the money to complete the purchase.

On December 29, 1916, the Southern Pine Lumber Co. arranged for a loan of $200,000 from the Boatmen's Bank, of St. Louis, Missouri. The notes on which such loan was made were mailed from Texarkana, Texas, to said bank on Saturday, December 30, 1916. In the normal course of the mails they would have arrived in St. Louis on Sunday, December 31, 1916. On December 30, 1916, Gilbert telegraphed Clark, vice president of petitioner, that the Southern Pine Lumber Company would exercise the option and was prepared to complete the transaction and pay over the money as soon as the papers were prepared. Clark received this telegram on December 30, 1916, and telephoned his attorney and the president of his company that the deal was closed and ordered the men who were starting to build a mill on the property dismissed. These employees stopped work on December 30th, came home the next day, and were not paid for any work done after December 30, 1916. The written instruments, which were required to complete the transfer, were delivered on January 5, 1917, at which time the balance of the purchase price was paid.

The Southern Pine Lumber Company, the purchaser, at the date of contract, December 27, 1916, and continuously to December 30, 1916, and afterwards, was amply solvent and ready, willing, and able to carry out said contract of December 27, 1916.

The purchasing company rendered the property in April, 1917, for taxes, the assessment being dated back under the Texas law to January 1, 1917.

Appellant did not report the profit from this sale until it
28 filed a supplemental income-tax return for the year 1916, in April, 1918. The commissioner determined that appellant

realized a profit of $79,057.95 from the sale of such land, which was income to it in 1917, and assessed the deficiency accordingly.

Opinion

PHILLIPS:

The single question involved in this appeal is whether the profit from the sale of the timberlands of the petitioner to the Southern Pine Lumber Company is income in 1916 or in 1917. The undisputed evidence is that on December 27, 1916, the parties arrived at an agreement as to the value of the land, and the purchaser expressed satisfaction with the title. No contract of sale was made on that date, however, for the purchaser found it necessary to make arrangements for financing the purchase price. A ten-day option was granted the Southern Pine Lumber Company. On December 30, 1916, it gave notice of its intention to exercise such option, thereby creating an enforceable contract between the parties for the sale of the property. It is contended that at that time the sale of the property became executed, that the purchaser acquired title, and that the purchase price became due to the petitioner. The deed to the property was delivered and the purchase price paid on January 5, 1917.

In support of its contention petitioner points out that on December 30, 1916, the purchaser was ready, able, and willing to perform the contract; that it had already passed upon the title of the petitioner as satisfactory; that the petitioner withdrew from the property the workmen who had theretofore been engaged in the construction of a mill; that upon the closing of the title adjustments were
29 made as of January 1, 1917; and that the purchaser paid taxes after January 1, 1917. None of these factors, however, seem sufficient to vest title to the property in the purchaser or to entitle the seller to have maintained an action in 1916 for the purchase price.

We do not question that equitable title passed to the purchaser at the time the option was exercised and a contract to sell came into effect, so that any loss or damage to the property would have been the loss or damage of the purchaser. We do not understand, however, that because equitable title may have vested the vendor then has a legal right to recover the purchase price, which is the principal question here involved, since the books of the petitioner were kept up on accrual basis.

Ordinarily one who has entered into a contract for the sale of property, whether real or personal, has no right to recover the purchase price until the delivery of the property sold. In the case of real property a right to recover by way of an action for specific performance may exist when a proper tender has been made. Here there was no delivery of the property to the purchaser either by giving it possession of the property, by delivery of a deed, or otherwise, until January 5, 1917, and no tender of delivery, and it was not until 1917 that any right to demand or receive payment of the purchase price arose.

Counsel for the petitioner calls attention to the decision of the United States District Court in Davidson & Case Lumber Co. v. Motter, 14 Fed. (2d) 137; 5 Am. Fed. Tax Rep. 6126. The court in that case appears to decide that title passed to the purchaser despite the fact that no conveyance was made and that the vendor remained in possession. There is room in that case, however, for the belief that the possession of the vendor continued under an agreement
30 with the purchaser and was that of a tenant. We have no such situation here, for, while the taxpayer removed its employees from the property on December 30, 1916, the purchaser did not go into actual possession either directly or through tenants or otherwise.

In its last analysis the contention of the petitioner is that the vendor of property becomes entitled to receive the purchase price of property at the time a contract for the sale of the property is entered into, if the title is satisfactory and the purchaser able to perform the contract. Certainly this is not the general rule throughout the United States, and no decisions have been cited showing it to be the law in Texas. While we have preferred to base our decision upon the broader ground, it might be noted that Kelly Morse, a minor who held title to a part of the tract to be conveyed, was not a party to the contract, and for that reason, even though such a contract could be considered as a sale, the title which the petitioner was to deliver was incomplete.

Reviewed by the board.

Decision will be entered for the respondent.

[Certificate to foregoing paper omitted in printing.]

31 Before United States Board of Tax Appeals, Washington

(Insignia)

NORTH TEXAS LUMBER COMPANY, PETITIONER

vs.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Docket No. 5208

Order of redetermination

Pursuant to the board's findings of fact and opinion, promulgated September 1, 1927, it is ordered and decided that, upon redetermination, there is a deficiency for the year 1917 of $19,733.90, which amount has been assessed, the deficiency arising from a refusal to abate the assessment of such amount.

(Signed) PERCY W. PHILLIPS,
Member United States Board of Tax Appeals.

Dated Washington, D. C., September 6, 1927.

RCT-o.

Government Printing Office. 2-14059 Form No. 524.
Rev. Feb., 1927.

[Certificate to foregoing paper omitted in printing.]

32 Before United States Board of Tax Appeals

Petition for review

Filed Feb. 28, 1928

[Title omitted.]

To the honorable United States Board of Tax Appeals:

North Texas Lumber Company, a corporation, organized under the laws of the State of Texas, and a resident of said State, appellant in the above-entitled and numbered cause, respectfully petitions your honorable body for a review of the decision of this honorable board, promulgated in the above-entitled and numbered cause, on September 1st, 1927.

The controversy was an effort on the part of appellant for a redetermination of a deficiency of $19,733.90, income profit taxes for the year 1917, arising from the denial by the Commissioner of Internal Revenue of a claim for the abatement of an assessment of additional taxes. The decision promulgated by the board of September 1st, 1927, was in favor of the appellee, and appellant was denied a redetermination of said deficiency and was denied its claim for abatement of the assessment of additional taxes. The review of this decision of this honorable board is sought in the United States Circuit Court of Appeals for the Fifth Circuit, at New Orleans, Louisiana, in which circuit is the State of Texas.

The petition for redetermination was filed in the office of the collector of internal revenue for the Second District of the State of Texas.

33 The taxes amounts to the sum of nineteen thousand seven hundred thirty-three and 90/100 ($19,733.90) dollars and are, therefore, in excess of ten thousand ($10,000) dollars.

The nature of the controversy

The nature of this controversy, briefly, arose out of the action of the Commissioner of Internal Revenue in allocating to the year 1917 a profit of $79,057.95, resulting from the sale of certain timberlands, which profit appellant contends that, as a matter of fact and as a matter of law, was realized during the calendar year 1916 and accounted for in its income-tax return for such year and the tax paid thereon. The books of appellant were kept on an accrual basis. The nature of the tax is a deficiency of income and excess-profit taxes for the year 1917, assessed under the revenue act of October 3, 1917, in amount of $19,753.90, the Commissioner of Internal Revenue having determined that the profits arose in the calendar year 1917. The error complained of by appellant is the action of the commissioner in allocating to the calendar year 1917 a profit of $79,057.95 from the sale of certain timberland, which profit appellant contends

was realized during the calendar year 1916 and accounted for in its income-tax return for such year and the tax paid thereon. If this profit was realized in the calendar year 1916, there would be no deficiency, which is conceded by the Commissioner of Internal Revenue. On the other hand, if the profit was realized in the calendar year 1917, there would be a deficiency of $19,733.90, which amount is recognized by both appellant and the Commissioner of Internal Revenue as correct.

34 Before United States Board of Tax Appeals

Assignments of error

1. Because the honorable United States Board of Tax Appeals erred in finding that the profits accrued to appellant in the calendar year 1917, for that the purchaser, Southern Pine Lumber Company, being solvent and willing to carry out the contract of December 27, 1916, and having accepted the title to the lands therein mentioned and having signified its acceptance of the option on December 30, 1916, which was in turn accepted and acted on by appellant, and appellant, at said time, being willing and able to comply with said contract, and as appellant kept its books upon an accrual basis the profits from said sale accrued to appellant on December 30, 1916, and are taxable for the calendar year 1916.

2. Because the honorable United States Board of Tax Appeals erred in finding that the profits did not accrue to appellant until the calendar year 1917 because the deeds from appellant to the purchaser were not actually delivered to the purchaser until January 5th, 1927.

3. Because from the nature and terms of the contract the consideration was cash and payable by the purchaser at the time of the exercise of the option, if the option be exercised within the period of time named in the contract and the delivery of a deed is not made a condition precedent to the cash payment by the terms of said contract.

Respectfully submitted.

NORTH TEXAS LUMBER COMPANY,
Appellant,

By F. I. CLARK,
Vice President.

JOSEPH J. ECKFORD,
Attorney for Appellant, North Texas Lumber Company.

35 STATE OF TEXAS,
County of Dallas.

Before me, a notary public in and for Dallas County, Texas, on this day personally appeared F. I. Clark, who, being by me first duly sworn, on oath states that he is vice president of the North Texas Lumber Company and authorized to make this affidavit, and that this petition for review is not made for delay, but is made in good

faith, and affiant verily believes that appellant has good grounds for review as set forth in said petition and assignments of error.

F. I. CLARK.

Sworn to and subscribed before me, this thirteenth day of February, A. D. 1928.

MARY WILSON,
Notary Public, Dallas County, Texas.

[Certificate to foregoing paper omitted in printing.]

36 *Statement of the evidence*

BEFORE UNITED STATES BOARD OF TAX APPEALS

No. 5208

[Title omitted.]

F. I. Clark, on behalf of the appellant, testified as follows:

"My name is F. I. Clark; aged 50; residence, Dallas, Texas. I was vice president of the North Texas Lumber Company. Mr. Wesley Morse was the president. We had negotiated with the Southern Pine Lumber Company for the sale of timberland during the summer or fall of 1916. On December 27th Mr. Gilbert came to my office at Dallas and we agreed on all the terms of the sale. We then went to Mr. Eckford's office and drew up the optional contract which was executed by Mr. Morse for the North Texas Lumber Company and by me for the Clark Boice Lumber Company and Mr. Gilbert for the Southern Pine Lumber Company. I identify the following as the original optional agreement."

Exhibit in evidence

STATE OF TEXAS,
County of Dallas.

The following contract and agreement is this day entered into by and between Clark & Boice Lumber Company, North Texas Lumber Company, and Wesley Morse, parties of the first part, and the Southern Pine Lumber Company, party of the second part:

37 In consideration of the sum of one hundred ($100.00) dollars to parties of the first part paid by party of the second part, parties of the first part hereby grant, contract, and convey to party of the second part an option for the period of ten (10) days from the date hereof to purchase of one or more of the parties of the first part the hereinafter-described property upon the terms and for the consideration hereinafter named.

The property to be purchased from the Clark & Boice Lumber Company consists of the property of the Jose Maria Mora grant in Anderson County, conveyed to Clark & Boice Lumber Company by Fannie M. Shelton and husband and Orra G. More by deed dated July 25, 1916, and duly recorded in vol. 113, page 612, deed records of Anderson County, Texas, to which deed and the record thereof reference is here made for a more particular description of said

property, consisting of about one thousand fifty-four (1,054) acres of land.

From the North Texas Lumber Company—all of the property situated in Anderson and Cherokee Counties, Texas, described in a certain deed from Hiram Knox and Mary S. Knox, to North Texas Lumber Company, dated May 18, 1915, and duly recorded in the deed records of Cherokee and Anderson Counties, Texas, to which deed and record thereof reference is here made for a more particular description of said porperty, consisting of about 14,000 acres of land.

Also from the North Texas Lumber Company—the timber vested in it, the said North Texas Lumber Company, by a certain contract between C. Lombardi and Caroline Ennis Lombardi and the North Texas Lumber Company, dated March 8, 1915, upon about 1,213 acres of land in the Highsmith survey and T. P. Hotchkiss survey in Anderson County, reference being here made to said contract
38 for a more particular description of said land. Also the timber rights vested in James Kelly Morse by a conveyance from the State of Texas upon one hundred (100) acres of land situated in Cherokee County, Texas, the said conveyance from the State of Texas being dated in the year 1916, and the only contract of that nature existing between the State of Texas and the said James Kelly Morse.

The consideration for said conveyance is the sum of two hundred thirteen thousand five hundred ($213,500.00) dollars, cash, and the agreement and assumption by the said Southern Pine Lumber Company of the unpaid money, principal and interest, against any of the properties above named, and the obligation of the grantee, as evidenced by the various instruments herein referred to, and all unpaid taxes against said land. Land, timber rights, and other rights is to be conveyed by parties of the first part to party of the second part by special warranty deed, but any rights that any of said parties of the first part may have by reason of warranties and the like are to be conveyed and vested in said Southern Pine Lumber Company.

In case said Southern Pine Lumber Company exercises the option herein granted within the time herein named, then the one hundred ($100) dollars paid at the time of the execution of this instrument, receipt of which is hereby acknowledged, is to be credited upon and to be a part of the cash consideration above named of two hundred and thirteen thousand and five hundred ($213,500.00) dollars. The Southern Pine Lumber Company is to make known the exercise of this option by a written instrument delivered to the Clark & Boice Lumber Company at its office in Dallas, Texas, within ten (10) days or mailed to it by registered letter within said ten (10) days from some point in the State of Texas, the date of mail-
39 ing to be indicated by the postmark upon such letter. A satisfactory indemnity obligation is to be executed by Wesley Morse to the Southern Pine Lumber Company to protect it in accept-

ing a deed from James Kelly Morse to his rights to the one hundred (100) acres hereinabove mentioned.

Witness our hands, respectively, this 27th day of December, A. D.

NORTH TEXAS LUMBER COMPANY,
(Signed) By WESLEY MORSE, *Pres.*
CLARK & BOICE LUMBER COMPANY,
(Signed) By F. L. CLARK, *Mgr.*
(Signed) WESLEY MORSE,
Parties of the First Part.
SOUTHERN PINE LUMBER COMPANY,
(Signed) By L. D. GILBERT, *Secy. & G. M.*,
Party of the Second Part.

While we were in Judge Eckford's office Mr. Gilbert stated that the closing of the transaction depended on their making some financial arrangements in St. Louis and that he wanted a few days in which to go to St. Louis and satisfy himself that those arrangements could be made, and then he would be ready to close the deal finally.

We bought this timber about a year prior to the said meeting in Judge Eckford's office. Judge Eckford had examined the title on all of the whole tract, there being about 27 or 28 tracts of land. After we had executed this agreement in Judge Eckford's office, Mr. Gilbert asked Judge Eckford if he had examined the title and had a written opinion of the same, and Judge Eckford told him
40 that he had, and Mr. Gilbert said he was satisfied the title was all right, if he had examined it, and he accepted the title. Judge Eckford gave him a signed office copy of the opinion that refers to all of these tracts. One of the tracts of land was involved in a suit, and when Mr. Gilbert was so informed he said he would assume that, and employed Judge Eckford to defend the suit for the Southern Pine Lumber Company. The next we heard from Mr. Gilbert or the Southern Pine Lumber Company was when we had a telegram from the Southern Pine Lumber Company in Texarkana to the Clark & Boice Lumber Company at Dallas. I received that telegram. I have not the telegram and have made diligent search for it and have had my office search diligently for it. This controversy with the Government came up some six or seven years afterward. I attempted to get a copy through the Western Union Telegraph Company, and they explained that their practice was to destroy copies of all messages each year. I also attempted to locate a copy through the Southern Pine Lumber Company but could not. I am acquainted with the substance of that telegram. The date of the telegram was December 30, 1916. It, in substance, was that they would exercise the option to complete the transaction and were prepared to pay over the money as soon as the papers were prepared.

The North Texas Lumber Company had bought some machinery for a complete sawmill to be erected on this land and had held up the shipment of it pending this sale. The headquarters of this com-

pany were in Case County and Mr. Morse lived at Linden in Case County, and he employed a crew of men to go down to this land and begin preparing to erect a sawmill. After I got this telegram from the Southern Pine Lumber Company I called Mr. Morse over
41 the telephone and told him that the deal was closed and the land was sold and to dismiss his men and stop any preparation he had made for clearing and starting to build a mill. The deeds, assignments, and other things were not completely prepared and ready to be executed until January 4, 1917. The deed was delivered to Mr. Gilbert and the money paid, except the $100.00 shown in the option, on January 5th; I had notified Mr. Wesley Morse to be there on January 5th and sign the papers; that the papers were ready, and we were prepared to deliver them to him and accept the money and he was there at that time. I made an amended return accounting for some profit for the year 1916 on or about the 15th day of April, 1918.

I do not have the original letter that I received from Mr. Jackson, of the Western Union Telegraph Company, in response to my inquiry, but I have a copy, and I identify the following, as the contents of the letter:

"We will be unable to furnish you the copy of a telegram sent you from Texarkana December 30th, 1916, as requested in your letter of September 11th, due to the fact that all telegrams are destroyed at the end of one year from the time of filing with us."

I received the telegram on December 30, 1916, while in my office at Dallas. Upon receipt of same I called Mr. Morse and told him about it and also called Judge Eckford and told him. I told Mr. Morse the Southern Pine Lumber Company had exercised their option and were prepared to pay their money and close the transaction, and the deed was prepared and the money turned over on January 5th, 1917. December 30th, 1916, was on Saturday. Under the terms of the sale with the Southern Pine Lumber Company they were to pay me $75,000 profit. In figuring what I was out I figured my inter-
42 est in making the settlement with Mr. Gilbert to December 30th, 1916. While I owned the timberland, no development work was done on same. The purchaser did not attempt to go in possession of the land prior to January the 5th, and I do not think he ever has gone into possession, as it is wild land.

Wesley Morse, on behalf of the appellant, testified as follows:

"My name is Wesley Morse; aged 51; and I reside at Linden, Texas, near Kildare. I was the president of the North Texas Lumber Company. There were only four stockholders in said company. I knew about the trade with the Southern Pine Lumber Company and executed the optional agreement. Mr. Clark 'phoned me that Mr. Gilbert would be over in Dallas and for me to come over and they would go over the sale of that timber. We had been negotiating about the timber for some time. We asked one price and they offered us another, and I came over and met Mr. Gilbert in Mr. Clark's office

on December 27, 1916. Mr. Gilbert offered us so many thousands of dollars profit and all expenses that we had been out in preparing to build a mill. I had had a crew of men working clearing off the ground and making preparations to build a mill. We agreed on the price of $75,000.00. This occurred in Mr. Clark's office. Mr. Gilbert or Mr. Clark suggested that we go over to Mr. Eckford's office and go over the papers or the opinion, and Mr. Gilbert said he would like to go back and see his company and have a couple of days. On the 27th of December we gave Mr. Gilbert a written agreement which has been introduced in evidence. I went home that night. That was on Wednesday, the 27th, I believe, and the next I heard from Mr. Clark was on Saturday, over long distance telephone, and he
43 informed me to cease operations and not to incur any more expense, as Mr. Gilbert had exercised the option. I then dismissed the men and dismissed everything.

"My mill at Banker burned in the summer of 1919, and I charged that the railroad burned it and was paid for it. Our records were there in the office and it burned and everything burned and we did not save any of the records.

"Mr. Robert Moore was my engineer in charge of a crew of men and I got in touch with him Saturday night and told him to dismiss the men, and they came home Sunday. This mill at Banker was practically cut out and this was another location, and I got in touch with Mr. Moore Saturday night and they all came in on Sunday. That was the time I stated that I telephoned and they came in on Sunday the 31st. Mr. brother, J. M. Morse, who was bookkeeper, filed the income-tax return for the year 1916 and 1917. The original return that I filed for 1916 did not include the profits on the sale of this timber. When I filed the supplemental return I included the profit for 1916. Mr. Clark called me about 11 o'clock, at least it was close to the noon hour, and then I put in a call for Mr. Moore while I was in the office and do not think that I got in touch with him until night. Mr. Moore notified the men not work any more that night, for they all came in the next day. They did not all come in on Sunday, but they did not work any more after Saturday; that was the last pay roll. They did not work on Sunday. I presume it is about 75 or 80 or may be 90 miles from my office to the place where these men were working. They went back and forth to work from Rusk. I lived in Linden—that is my headquarters and office—and they were working at Rusk. I called Mr. Moore from Linden, Texas, and I called while I was in the barber shop in the middle of the day, before noon or just after noon;
44 I could not say whether the Southern Pine Lumber Company started to work on the land during the spring or not. I did not pay any of these employees after Saturday, December 30th. We paid the men twice a month, on the 15 and the 30th. The men working out, not close to the office, are paid this way, but where they come in every night they are paid on a weekly basis. On that day they were paid for that half of the month; it may have been

ten or fifteen days before they got their money, as they generally run ten or fifteen days behind but we figured it up to that date. The Texas laws require us not to get further than fifteen days behind, so we have to pay twice a month. The reason payments were made this way was because we were following the Texas laws."

Without objection by the appellee the affidavit of Edwards Whitaker was received and read in evidence as a deposition on behalf of appellant. Such affidavit is as follows:

Exhibit in evidence

"I am the president of the Boatmen's Bank of St. Louis, Mo., a corporation, and was president of said bank during the entire year of 1916. In the month of December, 1916, I had certain negotiations with Messrs. T. L. L. Temple and L. D. Gilbert, of Texarkana, Texas, president and secretary, respectively, of the Southern Pine Lumber Company, looking toward the making of a certain loan of $200,000.00 by the Boatmen's Bank to the Southern Pine Lumber Company for the express purpose of making some timber purchases. In connection with these negotiations Mr. T. L. L. Temple called at the office of the Boatmen's Bank on December 21st, 1916, and then I had a subsequent interview with Mr. T. L. L. Temple and Mr. L. D. Gilbert on or about the 29th day of December, 1916, at which interview it was agreed by the Boatmen's Bank that
45 it would make the loan of $200,000.00. The notes representing this $200,000.00 loan were received by the Boatmen's Bank in a letter from the Southern Pine Lumber Company, dated at Texarkana, Texas, December 30, 1916."

L. D. Gilbert, on behalf of appellant, testified as follows:

"My name is L. D. Gilbert; aged 52; and I reside at Texarkana, Texas. In 1916 Mr. T. L. L. Temple was president of the Southern Pine Lumber Company, and I was secretary and general manager. In 1916 and 1917 the Southern Pine Lumber Company was solvent. It was quite a large company, having a considerable amount of assets over and above its liabilities. The company was financially able to carry this deal forward. On December 27th I met Mr. Clark in his office by appointment. I had seen him several times before, as I had been trying to buy this timber from him. On this day we agreed on a trade, and the terms and conditions were that we were to pay what they had paid for the timber, plus a profit of $75,000.00 and all expenses that they had been put to in connection with it, including taxes, interest on the money, and all of it.

"We went to Judge Eckford's office and executed this contract which has been introduced here. I asked for the ten-day option as I knew I would have to borrow money to make the cash payment and was not absolutely certain it could be done. Mr. Clark said he wanted to proceed to build a mill, that preparations were already under way to do so if the trade did not go through, and he impressed on me that he wanted to close the matter up as speedily as possible.

"Mr. Clark said that while he had given me ten days, he
46 would like for me to move as fast as I could and notify him immediately upon the conclusion of the financial arrangement. I went to Dallas from Texarkana on the night of the 27th and went the next day to St. Louis and was there on the 29th and left St. Louis on the night of the 29th, arriving in Texarkana on the 30th. I do not remember definitely sending this telegram, but I do know that I promised Mr. Clark that I would immediately notify him, and when we searched our files some several years afterward I could not find a copy of the telegram, but we make it a practice to destroy unimportant papers that are collected in the office about every year or two, for they accumulate and take up too much room. The notes that we executed to the Boatmen's Bank were dated December 30th and were mailed on that day to the Boatmen's Bank. That was the day that I got back to Texarkana. The only recollection that I have relative to notifying Mr. Clark of the signing of the notes to the Boatmen's Bank is that I know I would have notified him as soon as possible, as he impressed on me the need of haste, and I hurried in every way, going from Dallas to St. Louis and right back again, simply in order to hurry the matter from Mr. Clark. The notification I gave him was an acceptance of the sale, and the contract was consummated as of that date subject to our ability to get the money, and we succeeded in getting the money on the 29th and executed the notes to the bank on the 30th, and I am sure that is the day on which I notified Mr. Clark. Mr. Clark notified me when the papers were ready, and I came here on January 5th and executed the papers and paid over the money except the $100.00 I had paid under the option. The optional contract was written by Judge Eckford in his office after I had considered the agreements on December 27th. I talked to Judge Eckford about the title. It is customary in transactions of that kind for the buyer to take some time for the examina-
47 tion of the title, and I knew Judge Eckford and asked him if he had passed upon the title, and he said that he had and considered the title good, except as to one small tract that was in litigation, and I arranged with him to continue the lawsuit involving that tract at our expense and accepted the title as good. I asked him for a copy of his opinion and he delivered to me a copy at that time, the 27th day of December, 1916. I do not remember sending any telegram. I do remember, since Mr. Clark has refreshed my memory by his testimony, that I asked to be notified as to when I should come to Dallas and pay over the money and accept the delivery of the deed. I do not think there was any other instrument delivered on or before the first day of January at the office of Clark & Boice Lumber Company signifying my acceptance, except the execution of this contract. I think the records will show that the money was paid and the deed delivered on the 5th day of January. There was no other act that I know of, except the notification of our intention, performed prior to the first day of January. I do not think I mailed any registered letter to Clark & Boice Lumber Company prior to January 1, 1927.

relative to this agreement. I think I notified them by telegram. So far as I know, we have not taken actual possession of this land as yet further than to render it for taxes and pay taxes. We have never cut any of the timber. This was a purchase of some 2,000 acres of timberland which was considerably removed from our mill and from the operations we were carrying on at that time, and we have never cut but very little timber as yet. The bank at St. Louis passed the money to our credit in the course of the transaction and on the receipt of the notes which we sent them. I do not know when I was notified
48 that I had the credit, but I can refer to my books and see. I would presume that if December 30th was on Saturday that the proceeds of the notes were placed to our credit on the first of January. That would be the usual way of doing it. The letter to the bank enclosing the notes was mailed in Texas on December 30th. In the ordinary course the notes would arrive in St. Louis Sunday and would be cleared through the bank on the following day. Under the Texas law taxes are assessed against the person owning property on January first. I could not say to whom the taxes for the year 1917 were assessed against this property, but our company paid it and we rendered it in 1917 for taxes. We did not render it until about April, but it dated back."

Joseph J. Eckford, on behalf of appellant, testified as follows:

"My name is Joseph J. Eckford. I am 65 years old, and I live at Dallas, Texas, and have practiced law there since 1885. In 1916 and 1917 I was the attorney for the Clark & Boice Lumber Company and the North Texas Lumber Company and prepared the optional agreement introduced in evidence and also prepared the instruments necessary to effectuate the trade covered by the option. At that time I had no assistant in my office and we had no especially efficient stenographer. On account of the extreme difficulty in correcting misdescriptions of entries, I have become just a little, I will not say "cranky," but almost on the point of being extremely accurate in descriptions. The gentleman stated to me the trade, and I prepared the contract, and as the gentlemen were leaving the office Mr. Clark said there was no trouble about the Southern Pine Lumber Company negotiating
49 the money and to go ahead and prepare the papers.

"I had to assemble the data to prepare these various papers, and there was two and one-half holidays that intervened between December 27 and January the 5th.

"These gentlemen left my office just about closing time on December the 27th. In the last week of December lawyers who have corporate practice are interrupted a great deal in preparing the annual dividends for corporations which are declared in order for them to send out checks so as to avoid paying the taxes on January the 1st, and that interrupts you a great deal.

"Now a review of that instrument will show that the North Texas Lumber Company had conveyed to it all the tracts of land, and I am going to introduce my office copy to show the extent of that in-

strument and the difficulty of preparing it with care, if your honor will permit me. This is my office copy of the deed.

"Now, when the North Texas Lumber Company bought this land I handled that matter too. The North Texas Lumber Company did not have quite enough money to make the cash payment and the Clark & Boice Lumber Company advanced that and took from Knox certain of the land themselves. The recognized it was the property of the North Texas Lumber Company, but, as shown by their option, they had to make a deed to certain land, and this is a copy of that deed that I will introduce. It is a similar copy to the one that you saw.

"Now, in this settlement there was quite a long timber agreement with C. Lombardi and wife and the North Texas Lumber Company, and they had to be assigned to the Southern Pine Lumber Company, and I had to make a copy of that rather long agreement and this agreement I want to offer.

"Now there was a small tract in the name of Kelly Morse,
50 the son of Mr. Wesley Morse, a minor, and he had to make an indemnity agreement with the Southern Pine Lumber Company to protect them and guaranteeing that he would ratify it when he became of age.

"Then I had to prepare the necessary resolutions for the North Texas Lumber Company to enter on their minutes. I do not know that it is very material, but I have it here in my file. I don't know that I will bother about introducing that. My object is to show that in a few days after the holidays and attending to other matters, I was active in assembling the data to put into these instruments and getting these conveyances drawn. Every time there was a mistake in a field note I would have to throw away the whole page and rewrite it."

Statement re exhibits

The exhibits introduced by the witness, Joseph J. Eckford, being numbers three, four, five, and six, were as follows:

Exhibit Number Three: Deed from the North Texas Lumber Company to the Southern Pine Lumber Company conveying the property described in a certain deed dated May 18, 1915, from Hiram Knox and Mary S. Knox to the North Texas Lumber Company. This instrument consists of eleven typewritten pages.

Exhibit Number Four: Deed from F. I. Clark et al., doing business as Clark & Boice Lumber Company, to Southern Pine Lumber Company conveying property described in deed dated July 25, 1916, from Fanny M. Shelton et al., to Clark & Boice Lumber Company. This instrument consists of five typewritten pages.

Exhibit Number Five: Deed or assignment from the North
51 Texas Lumber Company to the Southern Pine Lumber Company of timber rights acquired by the North Texas Lumber Company in and by a certain contract dated March 8, 1915, between

C. Lombardi et al. and North Texas Lumber Company. This instrument consists of eleven typewritten pages.

Exhibit Number Six: Deed from Kelly Morse, a minor, to Southern Pine Lumber Company conveying timber rights conveyed to Kelly Morse by deed or grant from the State of Texas; and bond or indemnity agreement by Wesley Morse and F. I. Clark to the Southern Pine Lumber Company guaranteeing that Kelly Morse would ratify and confirm the conveyance when he became of age. These instruments consist of three typewritten pages.

The income-tax return of appellant for the calendar year 1916, filed June 30, 1917, and the supplemental income-tax return of appellant for the year 1916, filed April 15, 1918, were received in evidence without objection and marked "Commissioner's Exhibits A and B," respectively. The income-tax return of appellant for the 1917 was received in evidence without objection and marked "Petitioner's Exhibit 7." It was admitted that the profit was not returned by appellant in its income-tax return for the year 1917.

The foregoing, including the exhibits designated therein, which exhibits are by reference incorporated herein and made a part hereof, is all the evidence in the hearing in the above-entitled cause.

(Signed) JOSEPH J. ECKFORD,
FRANK J. ALBUS,
Attorney for petitioner.

52 The above statement of the evidence is approved by the undersigned as attorney for petitioner.

JOSEPH J. ECKFORD,
FRANK J. ALBUS,
Attorney for petitioner.

The above statement of the evidence is approved by C. M. Charest as attorney for the respondent, Commissioner of Internal Revenue.

C. M. CHAREST (T. P. D.),
Attorney for Respondent,
General Counsel, Bureau of Internal Revenue.

Order approving statement of evidence

The foregoing statement of evidence, including the exhibits designated therein, which exhibits are by reference incorporated therein and made a part thereof, having been duly presented to the Board of Tax Appeals, and having been found to be a true, complete, and properly prepared statement of evidence in the above-styled cause, is hereby approved.

PERCY W. PHILIPS,
Member, Board of Tax Appeals.

Dated March 19, 1928.

[Certificate to foregoing paper omitted in printing.]

53 Before United States Board of Tax Appeals, Washington, D. C.

No. 5208

[Title omitted.]

Præcipe for transcript of record

To the honorable, the members of the United States Board of Tax Appeals and to the clerk thereof:

You are respectfully requested to include the following in the transcript of the appeal in the above entitled and numbered cause:

1. The docket entries of proceedings before the Board of Tax Appeals.
2. Petition.
3. Answer.
4. Findings of fact, opinion, and decision of the board.
5. Final order of redetermination.
6. Petition for review and assignment of errors.
7. Statement of the evidence.

54 8. Appellant's Exhibits Numbers Six and Seven and Appellee's Exhibits A and B.

9. Præcipe.
10. Clerk's certificate.

JOSEPH J. ECKFORD,
Attorney for Appellant.

Of counsel:
FRANK J. ALBUS,
1166 National Press Bldg., Washington, D. C.

[Certificate to foregoing paper omitted in printing.]

U. S. Board of Tax Appeals filed at hearing, March 19, 1928. Div. 11, Docket 52-8.

Before U. S. Board of Tax Appeals

Statement re certain exhibits

Exhibit "Petitioner 6."—Deed from Kelly Morse to Southern Pine Lbr. Co.

Exhibit "Petitioner 7."—Income-tax return for 1917.

Exhibit "Respondent A."—Income-tax return for 1916.

Exhibit "Respondent B."—Supplemental income-tax return for 1916 and option of contract.

NOTE.—The above exhibits were omitted from the printed record as per stipulation of counsel copied at page 1.

55 [Minute entry of argument and submission, Nov. 7, 1928, omitted in printing.]

56 In United States Circuit Court of Appeals, Fifth Circuit

No. 5318

NORTH TEXAS LUMBER COMPANY, PETITIONER

VERSUS

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Petition for review of decision of the United States Board of Tax Appeals

Joseph J. Eckford (Paul T. McMahon on the brief), for petitioner.
Mabel Walker Willebrandt, Asst. Atty. Gen.; Sewall Key, spec. asst. to the Atty. Gen.; Randolph C. Shaw, spec. asst. to the Atty. Gen.; C. M. Charest, gen. counsel, Bureau of Int. Rev.; Thos. P. Dudley, spec. atty., Bureau of Int. Rev. (Shelby S. Faulkner, spec. atty., Bureau of Int. Rev., on the brief), for respondent.
Before WALKER, BRYAN, and FOSTER, Circuit Judges.

Opinion

Filed February 15, 1929

FOSTER, Circuit Judge.

In this case the material facts as found by the Board of Tax Appeals are these.

57 Petitioner, a Texas corporation, negotiated with the Southern Pine Company for the sale of certain timber lands in 1916. On December 27, 1916, the price was agreed upon and the purchaser was satisfied as to the title. The purchaser was solvent but required a few days to borrow some $200,000 to complete the purchase. An option was granted for ten days, the loan was arranged, and the purchaser telegraphed petitioner on December 30th, 1916, that it would exercise the option and was prepared to complete the purchase. Petitioner agreed at once, but the deed was not delivered until January 5, 1917.

Petitioner's books are kept on the accrual basis. Petitioner allocated the profit from the sale to the year 1916 and made a supplementary return to that effect. The Commissioner of Internal Revenue, however, found the profit to be $79,057.95, allocated it to the year 1917, in which year it was collected, and determined a deficiency of taxes for that year of $19,733.90. On appeal the board approved the action of the commissioner. This, we think, was error.

Profits accrue when they are fixed and an enforcible liability is created. Allen vs. Armstrong, 68 N. Y. S. 1079; Holmes Federal Taxes (6th Ed.), page 1248. Of course, delivery of the deed was nec-

essary to vest legal title in the purchaser, but between the parties the transaction was complete and their rights vested on December 30, 1916. Petitioner could on that day have tendered the deed and demanded payment and, if refused, could have maintained a suit for the purchase price. The subsequent delivery of the deed and collection of the purchase price did not change conditions as they existed on December 30, 1916, as to the amount of profit derived from the sale or its accrual.

Regardless of when the purchase money was paid, as petitioner kept books and made returns on the accrual basis, he
58 was obliged to allocate the profit from the transaction to the year 1916. During that year all the events necessary to fix the amount of the profit had occurred. This conclusion finds support in the reasoning of the court in U. S. vs. Anderson, 269 U. S. 423–441, in which it was held that taxes on munitions manufactured in 1916 for which a reserve had been set up should be deducted as an expense of that year, although paid in 1917. The same reasoning applies to profits earned in one year though not actually received until the following year when the books are kept on the accrual basis. See Am. Nat. Co., Receiver, vs. U. S., 274 U. S. 99.

The petition is granted and the judgment is reversed.

59 In United States Circuit Court of Appeals

No. 5318

NORTH TEXAS LUMBER COMPANY

VERSUS

COMMISSIONER OF INTERNAL REVENUE

Judgment

Feb. 15, 1929

This cause came on to be heard on the petition of the North Texas Lumber Company for a review of a decision of the United States Board of Tax Appeals, and was argued by counsel.

On consideration whereof it is now here ordered, adjudged, and decreed by this court that said petition be, and the same is hereby, granted, and that the judgment of the said United States Board of Tax Appeals be, and it is hereby reversed.

60 In United States Circuit Court of Appeals

[Title omitted.]

Motion for order staying mandate

Filed March 1, 1929

Now comes the Commissioner of Internal Revenue, the respondent herein, by his attorney, C. M. Charest, general counsel, Bureau of Internal Revenue, and moves the court to enter an order herein staying its mandate for a period of three months from the date of the entry of the judgment herein.

In support of this motion the said Commissioner of Internal Revenue respectfully shows to the court that he is considering the advisability of filing in the Supreme Court within the three months' period provided by statute in that respect a petition for certiorari in this cause; that it is highly probable that such petition for certiorari will be filed; and that he believes it undesirable under such circumstances to have the mandate of this court issue in accordance with the general rules of this court.

(Signed) C. M. CHAREST,
General Counsel, Bureau of Internal Revenue.

61 In United States Circuit Court of Appeals

Order staying mandate

On consideration of the application of the respondent in the above numbered and entitled cause for a stay of the mandate of this court therein, to enable respondent to apply for and to obtain a writ of certiorari from the Supreme Court of the United States, it is ordered that the issue of the mandate of this court in said cause be and the same is stayed for the period of three months from February 15th, 1929, the date of judgment, the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within three months from the date of said judgment there shall be filed with the clerk of this court the certificate of the clerk of the Supreme Court that the certiorari petition, record, and brief have been filed, and that due proof of service of notice thereof under paragraph 3 of Rule 35 of the Supreme Court has been given. It is further ordered that the clerk shall issue the mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon the expiration of said three months from the date of the judgment, unless the above-mentioned certificate shall be filed with the clerk of this court within that time.

Done at New Orleans, Louisiana, this 1st day of March, A. D. 1929.

(Signed) R. W. WALKER,
United States Circuit Judge.

62 [Clerk's certificate to foregoing transcript omitted in printing.]

63 Supreme Court of the United States

Order allowing certiorari

Filed October 14, 1929

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

64 [Indorsement on cover:] File No. 34210. United States Circuit Court of Appeals, Fifth Circuit. Term No. 92. Robert H. Lucas, as Commissioner of Internal Revenue, petitioner, vs. North Texas Lumber Company. Petition for writ of certiorari and exhibit thereto. Filed May 14th, 1929. File No. 34210.

O

Office Supreme Court, U.S.
FILED
MAY 14 1929
CHARLES ELMORE CROPLEY
CLERK

FILE COPY

No. 92

In the Supreme Court of the United States

OCTOBER TERM, 1928

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

NORTH TEXAS LUMBER COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF

U. S. GOVERNMENT PRINTING OFFICE: 1929

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In the Supreme Court of the United States

OCTOBER TERM, 1928

No. ———

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

NORTH TEXAS LUMBER COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF

PETITION

The Attorney General, on behalf of the Commissioner of Internal Revenue, prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Fifth Circuit, entered in the above cause on February 15, 1929, reversing the decision of the United States Board of Tax Appeals.

STATEMENT

The taxpayer on December 27, 1916, granted a ten-day option to the Southern Pine Lumber Company to purchase its timber lands for a certain

price. (R. 23–26.) The title to the property was examined on the same day and found to be satisfactory to the buyer. (R. 26.) On December 29, 1916, the Southern Pine Lumber Company arranged for a loan from a bank and telegraphed the taxpayer that it would exercise the option and would pay over the money as soon as the papers were prepared. Taxpayer thereupon ceased its operations on the property and withdrew its men who were working on the property. The written instruments which were required to complete the transfer were delivered on January 5, 1917, and the purchase price paid on that date. (R. 27.) The taxpayer company liquidated its business in 1917 subsequent to disposal of the timber land. (R. 23.)

The Southern Pine Lumber Company was amply solvent, ready and willing to carry out the contract of sale. (R. 27.)

The taxpayer kept its books upon an accrual basis. (R. 23.)

The Board of Tax Appeals affirmed the Commissioner's determination that the taxpayer realized a profit from the sale of its lands in 1917 which was held to be taxable as income for that year. (R. 28–30.) This decision was reversed by the Circuit Court of Appeals for the Fifth Circuit. (R. 56.)

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred:

1. In reversing the decision of the Board of Tax Appeals.

2. In holding that the profits from the sale of taxpayer's lands accrued to it when the contract to sell was entered into and not when the sale was consummated.

REASONS FOR GRANTING THE WRIT

The case is of general importance and the question is one which is constantly arising.

It has long been the consistent practice of the Bureau of Internal Revenue to hold that profits from sales accrue and become taxable only when the sales are consummated. The decision in this case of the Circuit Court of Appeals, that there is an accrual of profits with the execution of an enforceable contract, is therefore contrary to the long continued practice of the Bureau and leaves in doubt the treatment of the question in the future disposition of cases.

Cases are constantly arising involving this question and should the rule laid down by the Circuit Court of Appeals in the instant case be not adopted in other circuits serious loss of revenue to the Government might result if the assessments in such cases had been made to conform to this decision. This consequence would flow from the fact that under the recent Revenue Acts the period within which assessments may be made has been greatly shortened. So, should it be held by another Circuit Court of Appeals that taxable profits had been treated as arising in the wrong year, when assessed in accordance with the rule of this case, it is likely

that the statutory period within which a new assessment might be made would have already expired.

While the instant case is so far the only decision of an appellate court passing directly upon the question of when profits accrue from a sale, yet the reasoning of the Circuit Court of Appeals for the Second Circuit in the case of *Bedell* v. *Commissioner*, 30 F. (2d) 622, affords basis for apprehending a possible conflict of decision in the matter, if that case be not itself regarded as conflicting authority.

The decision of the court below, if acquiesced in, would leave the subject in confusion.

Wherefore, it is respectfully submitted that this petition for writ of certiorari to review the judgment of the Circuit Court of Appeals for the Fifth Circuit should be granted.

WILLIAM D. MITCHELL,
Attorney General.

MAY, 1929.

BRIEF IN SUPPORT OF THE PETITION

OPINIONS BELOW

The opinion of the United States Board of Tax Appeals (R. 28–30) is reported in 7 B. T. A. 1193. The opinion of the Circuit Court of Appeals for the Fifth Circuit (R. 55), reversing the decision of the Board, is reported at 30 F. (2d) 680.

JURISDICTION

The judgment of the Circuit Court of Appeals for the Fifth Circuit was entered on February 15,

1929. (R. 55.) The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. The appeal to the Board of Tax Appeals was taken prior to the passage of the Revenue Act of 1926, and there is presented the question whether the statutes authorizing appeals from the Board of Tax Appeals to the Circuit Courts of Appeals are unconstitutional on the ground that no judicial case or controversy is presented. This question is involved in No. 130, *Old Colony Trust Company* v. *Commissioner of Internal Revenue*, argued on April 15, 1929.

QUESTION PRESENTED

Did profits derived from the sale of respondent's lands accrue as income to the respondent in the year 1916 when the contract to sell was entered into, or in the year 1917 when conveyance was perfected?

STATUTES INVOLVED

The pertinent parts of the Revenue Acts of 1916 and 1917 are as follows:

Act of October 3, 1917, c. 63, 40 Stat. 300, 329:

> SEC. 1200. That subdivision (a) of section 2 of such Act of September eighth, nineteen hundred and sixteen, is hereby amended to read as follows:
>
> "(a) That, subject only to such exemptions and deductions as are hereinafter allowed, the net income of a taxable person shall include gains, profits, and income, derived from salaries, wages, or compensation

for personal service of whatever kind and in whatever form paid, or from professions, vocations, businesses, trade, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in real or personal property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever."

Act of September 8, 1916, c. 463, 39 Stat. 756, 770:

SEC. 13. (d) A corporation, joint-stock company or association, or insurance company, keeping accounts upon any basis other than that of actual receipts and disbursements, unless such other basis does not clearly reflect its income, may, subject to regulations made by the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, make its return upon the basis upon which its accounts are kept, in which case the tax shall be computed upon its income as so returned.

STATEMENT

A statement of the facts and of the errors relied upon will be found in the petition.

ARGUMENT

The taxpayer in the instant case did not keep its accounts upon the basis of actual receipts and disbursements, but its books were kept upon an ac-

crual basis. In accordance with the provisions of Section 13 (d) of the Revenue Act of 1916, the taxpayer was entitled to report its income upon the basis upon which its books were kept if such basis clearly reflected its income. But even an accrual system of accounting may not properly treat as income the profits from a sale which has not been completed. Especially is this true where the sale effects a total disposition of taxpayer's assets, or, in other words, a liquidation of its business. In such a case the situation is quite different from ordinary merchandising transactions, and in accordance with the principles of good accounting liquidating sales should be reported only in the year when finally completed, if income is properly to be reflected.

It has not been contested in the instant case that the taxpayer and the buyer had entered into a binding contract to sell the property in question. Nevertheless it is urged that the taxpayer, not having the unconditional right to the purchase price during the year 1916, may not include the profits from the sale in its income for that year, and that the profits should be included in income for the year 1917 when the sale was completed.

Under the "accrual" method of accounting, as opposed to the "actual receipts and disbursements" method, there is reported as income the income accrued and the expenses accrued whether actually received or not.

With respect to Federal taxation the courts have not attempted a precise definition of the term "accrued," but they have uniformly stressed the rule that income does not accrue until all the events conditional to payment have occurred and the liability has become fixed. *Edwards* v. *Keith*, 231 Fed. 110, 112 (certiorari denied, 243 U. S. 638); *Consolidated Tea Co.* v. *Bowers*, 19 F. (2d) 382; *United States* v. *Anderson, United States* v. *Yale & Towne Mfg. Co.*, 269 U. S. 422. This definition of the term "accrued" has also been applied in *Allen* v. *Armstrong*, 68 N. Y. S. 1079, and in *Ed. Schuster & Co.* v. *Williams*, 283 Fed. 115. See also Holmes Federal Taxes (6th Ed.), p. 1248.

This Court in the *Yale & Towne case, supra*, held that munitions taxes imposed by the United States accrued in the year the profits were earned, although the taxes were paid in subsequent years. The principle that to constitute an accrual all the events conditional to liability must have occurred was clearly recognized.

From the foregoing it is apparent that if the right to payment is not fixed but is conditional, income can not be said to have accrued.

In the instant case the taxpayer had neither made nor tendered conveyance in 1916. In fact, time was required to prepare the deed and this preparation was not completed until 1917.

The covenants of the vendor to convey and the covenants of the vendee to pay the purchase money

were mutual, reciprocal, and dependent. The contract in the instant case merely provided for the payment of the purchase price on the one hand and the conveyance of the property on the other, and no time was fixed for either and nothing was specified as to the relation of the two acts. (R. 4–6.) Under such state of facts the right to the purchase price was conditional. Before the taxpayer could be unconditionally entitled to the purchase price, which would include its profits, it would have to make a conveyance or tender of conveyance. *Montgomery* v. *Wise,* 138 Mo. App. 176; *Gober* v. *Hart,* 36 Tex. 139; *Clifton* v. *Charles,* 53 Tex. Civ. App. 448. The duty was also upon the taxpayer to prepare the conveyance, which was not done in the year 1916. *Perry* v. *Rice,* 10 Tex. 367.

In the case of *Bedell* v. *Commissioner of Internal Revenue,* 30 F. (2d) 622, the Circuit Court of Appeals for the Second Circuit held that the gain from a transaction involving the purchase and sale of a building is income in the year in which title passed and not in the year the contract of sale was made. In its opinion the court stated as follows (p. 624):

> While equity regards a vendee before payment as owner, still the payment is for the title, and is conditional on its delivery, as much as in the case of chattels where title has not passed. Of course, it is true that an obligation, even a conditional obligation, is

> in some sense property, and like anything else that can be transferred, may be said to have a value, but nevertheless payment is made in exchange for title, and will never be made if it is not conveyed. To speak of the profit as resulting because its amount can be presently ascertained, though performance remains uncertain, seems to us a perversion of language.

The foregoing decision, while dealing with a case where the taxpayer was on a cash receipts and disbursements basis, made no distinction between the various methods of accounting, and the reasoning of the opinion is susceptible of general application, irrespective of the method of accounting.

No profit is derived from a mere contract to sell. The sale may never be consummated; the parties may agree to rescind the contract, or they may both become unable to perform. Income is only derived from completed and closed transactions. A contract to sell becomes a completed and closed transaction when the sale is consummated. At that time income may be realized, but not before. Certainly, it can not be said that one realizes a profit from an agreement to sell.

CONCLUSION

In view of the far-reaching effect of the opinion below and the manifest need for an authoritative rule for the guidance of the Treasury Department in administering the tax statutes, it is respectfully

submitted that the petition for a writ of certiorari should be granted.

WILLIAM D. MITCHELL,
Attorney General.
MABEL WALKER WILLEBRANDT,
Assistant Attorney General.
ALFRED A. WHEAT,
RANDOLPH C. SHAW,
Special Assistants to the Attorney General.

MAY, 1929.

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CHARLES ELMORE
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No. 92

In the Supreme Court of the United States

OCTOBER TERM, 1929

ROBERT H. LUCAS AS COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

NORTH TEXAS LUMBER COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE PETITIONER

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In the Supreme Court of the United States

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No. 92

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v.

NORTH TEXAS LUMBER COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the United States Board of Tax Appeals (R. 16–17) is reported in 7 B. T. A. 1193. That of the United States Circuit Court of Appeals for the Fifth Circuit (R. 31–32) is reported in 30 F. (2d) 680.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on February 15, 1929. (R. 32.) Petition for writ of certiorari was filed on May 14, 1929, and the petition was granted October 14, 1929. (R.

34.) The jurisdiction of this Court is based upon Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Was the profit from the sale of the lands of the respondent, maintaining its accounts upon the accrual basis, derived in the year 1916, when a contract to sell was entered into, or in the year 1917, when the sale was consummated?

STATUTES INVOLVED

The pertinent parts of the Revenue Acts of 1916 and 1917 are as follows:

Act of October 3, 1917, c. 63, 40 Stat. 300, 329:

> SEC. 1200. That subdivision (a) of section two of such Act of September eighth, nineteen hundred and sixteen, is hereby amended to read as follows:
>
> "(a) That, subject only to such exemptions and deductions as are hereinafter allowed, the net income of a taxable person shall include gains, profits, and income, derived from salaries, wages, or compensation for personal service of whatever kind and in whatever form paid, or from professions, vocations, businesses, trade, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in real or personal property, also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or

profits and income derived from any source whatever."

Act of September 8, 1916, c. 463, 39 Stat. 756, 771:

SEC. 13. (d) A corporation, joint-stock company or association, or insurance company, keeping accounts upon any basis other than that of actual receipts and disbursements, unless such other basis does not clearly reflect its income, may, subject to regulations made by the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, make its return upon the basis upon which its accounts are kept, in which case the tax shall be computed upon its income as so returned;

* * * * *

STATEMENT

The facts as found by the Board of Tax Appeals are as follows:

The respondent on December 27, 1916, granted a ten-day option to the Southern Pine Lumber Company to purchase its timberlands for a certain price. (R. 13–15.) The title to the property was examined on the same day and found to be satisfactory to the buyer. (R. 15.) On December 29, 1916, the Southern Pine Lumber Company arranged for a loan from a bank and telegraphed the respondent that it would exercise the option and would pay over the money as soon as the papers were prepared. Respondent thereupon ceased its operations on the property and withdrew its men who were working on the property. The written

instruments which were required to complete the transfer were delivered on January 5, 1917, and the purchase price paid on that date. (R. 15.) The respondent liquidated its business in 1917 subsequent to disposal of the timberland. (R. 13.)

The Southern Pine Lumber Company was amply solvent, ready and willing to carry out the contract of sale. (R. 15.)

The respondent kept its books upon an accrual basis. (R. 13.)

The Board of Tax Appeals sustained the Commissioner's determination that the respondent's profit from the sale of its lands was realized in 1917 and was taxable for that year. (R. 15–17.) This decision was reversed by the Circuit Court of Appeals for the Fifth Circuit. (R. 32.)

SPECIFICATION OF ERRORS TO BE ARGUED

The Circuit Court of Appeals erred—

1. In reversing the decision of the Board of Tax Appeals.

2. In holding that the profits from the sale of respondent's lands accrued to it when the contract to sell was entered into and not when the sale was consummated.

SUMMARY OF ARGUMENT

The single question in this case is in what year the respondent company, maintaining its accounts upon the accrual basis, derived profits from a sale of its entire timberlands. Contract to sell was made in December, 1916, but no conveyance took

place until January, 1917. On the one hand, it may be contended that, as there was a binding contract to sell entered into during 1916, with the price agreed upon and the profits from the sale definitely ascertainable, the decisions of this Court in *United States* v. *Anderson,* 269 U. S. 422, and *American National Company* v. *United States,* 274 U. S. 99, necessitate the determination of this question in favor of the respondent. On the other hand, the Treasury Department has consistently ruled that in an executory contract to sell real property the right to payment does not become fixed upon the execution of the contract and income can not be said to have then accrued.

The interest of the Government is primarily to secure a determinative decision with respect to the question here involved. It is submitted that neither the *Anderson case* nor the *American National case* requires a disturbance of the settled practice of the Treasury Department.

ARGUMENT

Under Section 13 (d) of the Revenue Act of 1916 respondent was privileged to report its income on the basis upon which its accounts were kept, if such basis clearly reflected its income. Respondent in this case maintained its accounts upon the so-called "accrual" basis and accordingly has sought to return as income in 1916 the profits derived from the sale of all its timberlands.

It was not contested below that a binding contract to sell was entered into during the year 1916,

nor that title was satisfactory and the purchaser able and willing to carry out the sale. Upon these admitted facts the Circuit Court of Appeals has held that, under the accrual system of accounting followed by respondent, the profits from the sale were returnable as income in 1916.

As authority for its decision, the Circuit Court of Appeals has relied upon *United States* v. *Anderson*, 269 U. S. 422, and *American National Company* v. *United States*, 274 U. S. 99. In the *Anderson case* this Court held that munitions taxes for the year 1916 became fixed and determinable in that year, though not due until 1917, and sustained the decision of the Commissioner that a deduction for such taxes should be taken in 1916 rather than in 1917.

In discussing the accrual of the tax, the opinion in the *Anderson case* held (p. 441) that all of the events which fixed the amount of the tax and determined the liability of the taxpayer to pay it occurred in the earlier year. The Circuit Court of Appeals in the instant case has held that as between the parties the transaction was complete and their rights vested during the year 1916. (R. 32.)

On the one hand, it may be contended that, as there was a binding contract to sell entered into during 1916, with the price agreed upon and the profits from the sale definitely ascertainable, the profit should be deemed to have accrued in that year, within the principle of the *Anderson* decision. On the other hand, the view which the Treasury Department has taken is that in an executory con-

tract to sell real property the right to payment does not become fixed upon the execution of the contract, and income can not be said to have then accrued. Briefly stated, the position of the Department is that an agreement to sell is not a sale (see Thompson on Real Property, Vol. 5, Sec. 4275), and the profits are conditional upon consummation.

The decision of the Circuit Court of Appeals in this case is therefore contrary to the practice of the Treasury Department, which has long held that no profit is derived from a mere contract to sell real estate in the future. Early rulings, that gain or loss can be regarded as realized only when the sales are consummated (see C. B. 2, p. 78 (A. R. R. 13), C. B. 2, p. 84 (O. 988)), have been consistently applied to taxpayers on the accrual basis, as well as to those on the cash basis.

In the instant case the taxpayer had neither made nor tendered conveyance in 1916. The duty was upon the taxpayer to prepare the conveyance (*Perry* v. *Rice,* 10 Tex. 367), and the written instruments necessary to effect the transfer were not completed and delivered until 1917. (R. 4, 15.) It would further appear from the testimony of respondent's vice president and its counsel that the necessary papers of conveyance were of a character precluding their completion in 1916. (R. 23, 27–28.

The covenants of the vendor to convey, and the covenants of the vendee to pay the purchase money, were mutual and reciprocal. The contract in the in-

stant case merely provided for the payment of the purchase price on the one hand and the conveyance of the property on the other; no time was fixed for either, and nothing was specified as to the relations of the two acts. (R. 13–15.) Under such state of facts, the right to the purchase price was conditional. Before the taxpayer could be unconditionally entitled to the purchase price, which would include its profits, conveyance or tender thereof was necessary. *Montgomery* v. *Wise,* 138 Mo. App. 176; *Gober* v. *Hart,* 36 Tex. 139; *Clifton* v. *Charles,* 53 Tex. Civ. App. 448.

In the *American National Company case, supra,* also cited by the Circuit Court of Appeals, the taxpayer was in the business of making loans secured by mortgages upon real estate which it negotiated and sold to investors. It derived its income from commissions in the form of notes made by the borrowers, and, in order to induce purchasers of the notes to buy direct from the company, thus obviating the payment of selling commissions, agreed to pay the purchasers bonuses of a specified percentage yearly on the notes and during the life thereof. The taxpayer accrued the aggregate of the bonus contracts made during the year as expenses thereof and also followed the practice of accruing the aggregate of the commission notes received during a tax year as income, thus effecting the balancing of accounts and the true reflection of income. Upon these facts it was held that the bonus contracts were rightly treated by the taxpayer as " 'an

expense incurred and properly attributable' to the Company's process of earning income during'' the taxable year.

It is clear that in the *American National Company case,* the bonus contracts became actual and enforceable liabilities of the maker in the year in which given, although payment was not then due. In that case all the events which fixed the liability had occurred within the year in question. In the instant case, there did not in 1916 exist a right enforceable within that year, as the respondent had not made or tendered conveyance. It is true that the amount which the respondent in this case would derive from the sale was definitely ascertainable when the contract to sell was entered into, but payment might never have been made, for a breach, rescission, or release might have occurred, and the title might never have been conveyed.

In the case of *Bedell* v. *Commissioner of Internal Revenue,* 30 F. (2d) 622, the Circuit Court of Appeals for the Second Circuit held, *inter alia,* that the gain from a transaction involving the purchase and resale of a building was income in the year in which title passed and not in the year the contract of sale was made. It was there said (p. 624):

> we do not understand that the appellant maintains that a contract of sale would measure the profit before the time of payment; at any rate it is clear that it would not. While equity regards a vendee before payment as owner, still the payment is for the title, and is conditional on its delivery, as

> much as in the case of chattels where title has not passed. Of course, it is true that an obligation, even a conditional obligation, is in some sense property, and like anything else that can be transferred, may be said to have a value, but nevertheless payment is made in exchange for title, and will never be made if it is not conveyed. To speak of the profit as resulting because the amount can be presently ascertained, though performance remains uncertain, seems to us a perversion of language.

In the foregoing case the taxpayer was on the cash receipts and disbursements basis, but in a general way the above quotation expresses the reasons which underlie the Treasury Department's rule that profits from sales of realty can not be accrued until conveyance is made.

So far as we have been able to ascertain, the instant case is the only decision of an appellate court passing directly upon the question as to when profits from the sale of realty are returnable as income in the case of a taxpayer on the accrual basis.

Unlike *United States* v. *Anderson, supra,* and *American National Company* v. *United States, supra,* no showing has been made in this case that the expenses connected with the sale of the property appear in the taxpayer's 1916 accounts as an offset to the income. Accordingly, there is no room for the contention here that a failure to allow the accrual of the profits in 1916 would result in a distortion of the taxpayer's income for that year.

The interest of the United States is not to win this case but to have a rule adopted for general application to sales of real property which would be sound and consistent with the statute. The affirmance of the decision of the court below would overturn a long administrative construction of the Revenue Acts. We submit that neither the *Anderson case* nor the *American National case, supra,* requires this.

CONCLUSION

It is deemed important that a determinative decision be rendered with respect to the question here involved. The case is therefore submitted for the judgment of this Court.

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NOVEMBER, 1929.

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No. [illegible] 92

In the

Supreme Court of the United States

COMMISSIONER OF INTERNAL REVENUE,
Petitioner,

vs.

NORTH TEXAS LUMBER COMPANY,
Respondent.

BRIEF FOR RESPONDENT

ALBERT B. HALL,
Dallas, Texas,
JOSEPH J. ECKFORD,
Dallas, Texas,
Attorneys for Respondent,
North Texas Lumber Company.

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No. 901

In the

Supreme Court of the United States

COMMISSIONER OF INTERNAL REVENUE,

Petitioner,

vs.

NORTH TEXAS LUMBER COMPANY,

Respondent.

BRIEF FOR RESPONDENT

The statements of petitioner in his petition and brief are sufficient to present the only question at issue in the case. Respondent does not deem the second specification of error by petitioner as accurately stating the question and respondent submits the following as the question presented by the record in this case:

The purchaser being solvent and willing to carry out the contract of December 27, 1916, and having accepted the title to the lands therein mentioned and having signified its acceptance of the option on December 30, 1916, which was in turn accepted and acted on by seller, and the seller at said time being willing and able to comply with said contract, and as the seller

kept its books upon an accrual basis, and as all the events occurred necessary to fix the amount of the profits and determine the liability of the tax payer on December 30, 1916, the profits accrued on said date and are taxable for the calendar year 1916.

ARGUMENT

There is quite a distinction made, and which clearly exists, between a case where the tax payer keeps his books on a cash basis and where he keeps them on an accrual basis. The latter method is the one followed by respondent and the Honorable Commissioner seems to make no distinction between books kept on a cash basis, and books kept on an accrual basis. In 1921 the Honorable Commissioner promulgated certain regulations and rulings and among them is Article 52, which reads as follows:

> "When included in gross income.—Gains, profits and income are to be included in the gross income for the taxable year in which they are received by the taxpayer, unless they are included when they accrue to him in accordance with the approved method of accounting followed by him."

In Cumulative Bulletin No. 2, January-June 1920, on page 80, the department stresses the fact that an action for specific performance would not have put the vendee in possession during 1917, because he was not under the contract entitled to possession until 1918, and at page 84, Opinion 988, says:

> "No realization of gain or loss arises from a mere contract to sell real estate in the future. The sale is held to occur at the time a deed passes, or at the time possession and the burdens and benefits of ownership are from a practical standpoint transferred to the buyer, whichever occurs first."

Petitioner cites the case of
Gober vs. Hart, 36 Texas 139.

The contention of respondent is sustained by that case for in that case the Court says:

> "When the vendor sues for the purchase-money for real estate, he should show that he has made the conveyance in full compliance with the terms of the sale, or that he is now ready and willing and able to make such conveyance on the payment of the purchase money."

On December 30, 1916, respondent was ready and willing and able to make conveyance on the payment of purchase money. In fact had been preparing the various instruments since December 27th, 1916. (R. p. 48). There is nothing in the option and contract making the delivery of the deed a condition precedent to the payment of the purchase money. The vendee was not entitled to the deed until he paid the purchase money. To the same effect is the other Texas case cited by petitioner, *Clifton vs. Charles, 116 S. W. 120,* which says:

> "Under an executory contract for the sale of land, the obligations of the parties are mutual and reciprocal; the vendor, if he owns the land, on tender of the purchase money, being required to execute a conveyance according to the agreement and the vendee, on tender of a conveyance, being required to render the consideration."

The rule laid down in 39 Cyc. pp. 1641 and 1642, sustains respondent in this case, particularly in regard to the qualifications and exceptions to the rule. As this transaction was wholly a cash transaction and the title had been accepted, it makes the instant case stronger than those in the books.

The attention of the Court is called to *Sewell vs. Underhill*, (N. Y. Court of Appeals). *197 N. Y. 168, 90 N. E. 430, 27 L. R. A. (N. S.) p. 233.* In that case, the delivery of the deed was postponed until a map could be prepared. A fire occurred before the map was prepared and before the deed was actually delivered, and title was held to be in vendee. The original English case, *Paine vs. Moller, 6 Ves. Jr. 349*, which has been followed by the great majority of American courts, is also quite similar to the instant case. As quoted in the New York Court of Appeals case, this case states:

> "Somewhat like the present case, there, AFTER THE ACCEPTANCE OF THE TITLE, a delay occurred in the preparation and execution of the deed,"

but the English case held that the loss fell on the vendee.

The authorities cited in the notes at *43 L. R. A. (N. S.) p. 51* is in line with this authority.

Davidson & Case Lbr. Co. vs. Motter, (U. S. District Court, District of Kansas, Second Division, March 2, 1926) reported in Prentice-Hall Service, 1926, at page 1356, is a case directly in point. We refer to this

case without quotations as it would make this brief too long to quote the entire opinion and it is difficult to condense same.

Possession of this wild timber land which was the subject of the sale was surrendered to the purchaser, as far as it was possible on the part of the vendor to do so, on December 30, 1916. (R. p. 43). The Vendor vacated possession, ceasing to exercise any ownership, or dominion, over same and the purchaser could use such property in such manner as it saw fit. Vacating the property so as to not interfere with the entry and absolute possession of the purchaser is all that a vendor can ever do. He cannot control the action of the purchaser. No other persan was in possession of the property holding adversely to seller or purchaser; and all of the right, title and ownership and possession of the vendor was vested in the vendee, or purchaser, by reason of the acceptance of the option.

Respondent respectfully submits that the judgment of the Honorable United States Circuit Court of Appeals for the Fifth Circuit in this case is fully sustained oy the decisions of this Honorable Court in *U. S. vs. Anderson, 269 U. S. 423*, and *American Nat. Co., Receiver, vs. U. S., 274 U. S. 99*, and respondent

respectfully submits that the petition for Certiorari should be refused.

Respectfully submitted,

ALBERT B. HALL,
Dallas, Texas,
JOSEPH J. ECKFORD,
Dallas, Texas,
Attorneys for Respondent,
North Texas Lumber Company.

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Petitioner,

vs.

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Respondent.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit

BRIEF FOR RESPONDENT

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ARGUMENT

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> "Under an executory contract for the sale of land, the obligations of the parties are mutual and reciprocal; the vendor, if he owns the land, on tender of the purchase money, being required to execute a conveyance according to the agreement and the vendee, on tender of a conveyance, being required to render the consideration."

The rule laid down in 39 Cyc. pp. 1641 and 1642, sustains respondent in this case, particularly in regard to the qualifications and exceptions to the rule. As this transaction was wholly a cash transaction and the title had been accepted, it makes the instant case stronger than those in the books.

The attention of the Court is called to *Sewell vs. Underhill*, (N. Y. Court of Appeals). *197 N. Y. 168, 90 N. E. 430, 27 L. R. A. (N. S.) p. 233.* In that case, the delivery of the deed was postponed until a map could be prepared. A fire occurred before the map was prepared and before the deed was actually delivered, and title was held to be in vendee. The original English case, *Paine vs. Moller, 6 Ves. Jr. 349*, which has been followed by the great majority of American courts, is also quite similar to the instant case. As quoted in the New York Court of Appeals case, this case states:

> "Somewhat like the present case, there, AFTER THE ACCEPTANCE OF THE TITLE, a delay occurred in the preparation and execution of the deed,"

but the English case held that the loss fell on the vendee.

The authorities cited in the notes at *43 L. R. A. (N. S.) p. 51* is in line with this authority.

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Respondent respectfully submits that the judgment of the Honorable United States Circuit Court of Appeals for the Fifth Circuit in this case is fully sustained by the decisions of this Honorable Court in *U. S. vs. Anderson, 269 U. S. 423*, and *American Nat. Co., Receiver, vs. U. S., 274 U. S. 99*, and respondent

respectfully submits that the judgment of the United States Circuit Court of Appeals should be affirmed.

Respectfully submitted,

ALBERT B. HALL,
Dallas, Texas,
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Dallas, Texas,
Attorneys for Respondent,
North Texas Lumber Company.

SUPREME COURT OF THE UNITED STATES.

No. 92.—October Term, 1929.

Robert H. Lucas, as Commissioner of Internal Revenue, Petitioner, *vs.* North Texas Lumber Company. } On Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

[February 24, 1930.]

Mr. Justice Butler delivered the opinion of the Court.

The respondent, a Texas corporation, for some time prior to 1917 was engaged in operating a sawmill, selling lumber and buying and selling timber lands. December 27, 1916, it gave to the Southern Pine Company a ten day option to purchase its timber lands for a specified price. The latter was solvent and able to make the purchase. On the same day title was examined and found satisfactory to the Pine Company. It arranged for the money needed and December 30, 1916, notified respondent that it would exercise the option. On that day respondent ceased operations and withdrew all employees from the land. January 5, 1917, the papers which were required to effect the transfer were delivered, the purchase price was paid and the transaction was finally closed.

Respondent kept its accounts on the accrual basis and treated the profits derived from the sale as income in 1916. The Commissioner of Internal Revenue determined that the gain had been realized in, and was taxable for 1917. The Board of Tax Appeals sustained his finding. 11 B. T. A. 1193. The Circuit Court of Appeals reversed the Board. 30 F. (2d) 680.

The gain derived from this sale was taxable income.[1] If attributed to 1916 the tax would be much less than if made in 1917.[2] Section 13 (d) of the Revenue Act of 1916 provided that a corporation keeping its accounts upon any basis other than that of

[1] § 2 (a), Act of September 8, 1916, 39 Stat. 756, 757. § 1200, Act of October 3, 1917, 40 Stat. 300, 329.

[2] § 10, Act of September 8, 1916, 39 Stat. 756, 765. § 201, Act of October 3, 1917, 40 Stat. 300, 303.

actual receipts and disbursements, unless such other basis failed clearly to reflect income, might make return upon the basis upon which its accounts were kept and have the tax computed upon the income so returned.[3]

An executory contract of sale was created by the option and notice, December 30, 1916. In the notice the purchaser declared itself ready to close the transaction and pay the purchase price "as soon as the papers were prepared". Respondent did not prepare the papers necessary to effect the transfer or make tender of title or possession or demand the purchase price in 1916. The title and right of possession remained in it until the transaction was closed. Consequently unconditional liability of vendee for the purchase price was not created in that year. *Gober* v. *Hart*, 36 Texas 139. Cf. *United States* v. *Anderson*, 269 U. S. 422, 441. *American National Company* v. *United States*, 274 U. S. 99. The entry of the purchase price in respondent's accounts as income in that year was not warranted. Respondent was not entitled to make return or have the tax computed on that basis, as clearly it did not reflect 1916 income.

Judgment reversed.

A true copy.

Test:

Clerk, Supreme Court, U. S.

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[3] 39 Stat. 756, 771.